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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-825

CENTRAL IOWA REFUSE SYSTEMS, INC.

Petitioner,

VS.

DES MOINES METROPOLITAN SOLID WASTE AGENCY, ETC., ET AL,

Respondent.

# ANSWER TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY APPLIED THIS COURT'S STANDARDS FOR IMMUNIZING THE ALLEGEDLY ANTI-COMPETITIVE CONDUCT OF MUNICIPAL AND COUNTY GOVERNMENTS IN PERFORMING ESSENTIAL AND GOVERNMENTAL DUTIES.

II. WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE DISTRICT COURT CONCLUDING THAT THE IOWA LEGISLATIVE SCHEME AND THE PROUNCEMENTS OF THE IOWA STATE COURTS DEMONSTRATED A STATE CONTEMPLATION OR COMPREHENSION THAT LOCAL GOVERNMENT UNITS WOULD INITIATE AND OPERATE SOLID WASTE DISPOSAL SITES AS EXCLUSIVE FACILITIES.

III. WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT THE STATE NEED NOT ACTIVELY SUPERVISE LOCAL GOVERNMENTAL UNITS AS A CONDITION OF ACCORDING STATE ACTION IMMUNITY FOR MUNICIPAL CONDUCT, WHERE THE CHALLENGED CONDUCT CONSISTS OF ESSENTIAL GOVERNMENTAL ACTIVITIES SUCH AS THE DISPOSAL OF SOLID WASTE.

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## STATEMENT OF THE CASE

In 1966 the city governments in and around Des Moines, Iowa, became aware of a significant and growing problem concerning disposal of solid waste generated in their communities. The existing open-dump disposal site was simply unable to properly handle the volume of solid waste coming to the dump and the serious sanitation and environmental problems created by the situation. More seriously, the city managers knew that the rate of increase in the volume of solid waste would soon outstrip the local facility's ability to safely dispose of the refuse.

In response to this impending crisis the Respondent-Municipalities began serious study of the problem and consideration of solutions. Engineering consulting firms were retained to perform a study which was funded by a federal grant from the U.S. Public Health Service. The study

recommended that the Municipalities collectively construct and manage a unitary solid waste disposal site which would be designed to accomodate the accelerating volume of solid waste and ameloriate the growing sanitary and environmental problems.

Newly enacted Iowa legislation permitted municipalities, counties and other governmental subdivisions to collectively form agencies, in the exercise of state government powers, to provide necessary and important services. Iowa Code, Section 28E.1 (1981). Companion legislation to Chapter 28E provided that such agencies formed under Chapter 28E would be financed by revenue bonds and that such bonds "...may contain such terms, covenants and conditions, and may be in such form otherwise, as such resolution or subsequent resolutions shall provide." Iowa Code, Section 28F.8 (1981). Other

provisions of Chapter 28F require the joint agency to issue revenue bonds for any necessary financing, enter into agreements with financial advisers and attorneys for planning and supervising the bond issuance, pledge revenues and determine the rates and changes for use of the project, operate the solid waste project in an "efficient and economical" manner, and to subject the bonds to whatever conditions or limitations as are necessary.

However the Iowa legislature was not only considering the methods by which local governmental units could remedy the problems of solid waste disposal; it was also considering the necessity of firm leadership and control by the local governments. In 1970 the legislature enacted statutory requirements that cities and counties must provide for environmentally safe and sanitary disposal of wastes. Iowa Code, Sections 455B.76,

332.44 (1981). These statutes also required the local governmental units to take all necessary steps to arrange for suitable financing in the establishment and operation of solid waste disposal facilities.

Therefore, the Municipalities, under the beneficial provisions of Iowa law, formed the Metropolitan Solid Waste Agency ("Metro") by adoption of an Intergovernmental Agreement and a Solid Waste Disposal Contract. The Agreement essentially created Metro and provided inter alia for financing of the solid waste disposal project and for internal regulation of Metro's members. The Contract established schedules for payment by members to Metro for disposal of solid waste. Since, under the state law, Metro was being established with revenue bonds, and because of the insistence of Metro's bond consultants and lawyers, the Contract

also provided that all member governmental units would use the Metro facility for disposal of solid wastes collected from their communities and that none of the members would participate in or operate a solid waste disposal facility which would compete with Metro. These exclusivity provisions were required by Metro's bond consultants because it was their opinion, and the opinion of bond counsel, that the bonds would be unmarketable if the revenue stream could not be guaranteed. Moreover, without an assurance of revenues, the Municipalities could become liable for any default of payment under the bonds in contravention of state law. The bonds were duly marketed and Metro planned, built and managed a modern and efficient solid waste landfill.

On two occasions the Iowa courts considered challenges to the Metro operation. A taxpayer's suit was filed

claiming that the joint agency and financing provisions in Chapters 28E and 28F were unconstitutional as an improper delegation of legislative power to the Municipalities and that the issuance of the revenue bonds could result in the imposition of a general tax upon property owners if the agency's exclusive agreements fail to result in the repayment of the bond issue. The Iowa Supreme Court, in Goreham v. Des Moines Metro Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1979), held that the state could properly delegate certain legislative functions to the agency and that the municipal members to the Metro Agreement and Contract could not withdraw from the compact until all the bonds had been repaid. According to the court, the revenue bonds did not impose additional burdens upon municipal taxpayers because the bonds would be retired by the revenues generated through exclusive operation of the Metro facilities.

Subsequently, in 1974, the Polk County District Court, in a declaratory judgment action to construe the exclusivity provisions in the Contract, held that all municipality members of Metro must deposit all solid waste at the Metro facility until the bonds were retired. The Municipalities subsequently passed ordinances concerning solid waste collection and disposal and these ordinances generally require persons collecting and hauling solid waste to deposit waste at the Metro facility.

The Petitioner, by and through its president and chief shareholder, has operated waste collection and disposal services since the early 1960's. CIRS operated a landfill in Mason County from 1975 to September 1980. During that time CIRS was cited for fifteen (15) violations by the State, and its license was ultimately revoked for a period of time.

In January of 1979, CIRS filed this antitrust action claiming that the

exclusivity provisions in the Contract and the joint ownership of the landfill site by the Municipalities are restraints of trade, a monopoly and an attempt to monopolize trade or commerce. The United States District Court for the Southern District of Iowa dismissed the complaint, holding that the legislative scheme in Iowa evidenced a contemplation by the state legislative that the Metro facility would be operated as the exclusive landfill in the central Iowa area. Moreover, the district court also concluded that the state had actively supervised the conduct of the Municipalities and the operation of the Metro and therefore the Municipalities' actions were immune from antitrust attack under the state action doctrine.

The Eighth Circuit Court of Appeals, in a thorough opinion, affirmed the district court's conclusion that the legislative scheme and the interpretations of the state

courts evidenced a state comprehension that the Metro would be managed exclusively and that the evidence permitted a reasonable inference of a "clearly articulated and affirmatively expressed state policy" to displace competition in the market for solid waste disposal service. However, the appellate court also held that where local governmental units, rather than private parties acting pursuant to the requirement of state law, are charged with antitrust violations, the local governmental units need not demonstrate active state supervision to find immunity under the state action doctrine.

## I. THE LOWER COURT CORRECTLY CONSTRUED AND APPLIED THIS COURT'S STANDARDS FOR IMMUNIZING ALLEGEDLY ANTICOMPETITIVE CONDUCT BY MUNICIPAL GOVERNMENTS FROM THE FEDERAL ANTITRUST LAWS.

The gravaman of CIRS' Petition for a Writ of Certiorari submits that the lower courts misapplied this Court's standards on the state action doctrine and the immunity

of local and municipal governments from the reach of the federal antitrust laws. However, careful consideration of the holdings and opinions of the district court and appellate court in this case compels the conclusion that those courts both understood and correctly applied this Court's rulings. Moreover, the decisions of the lower courts in this case are consistent with decisions of other circuits on the issue of state action immunity for municipal operation of essential and governmental facilities and services. Finally, the decisions of the lower courts are fully consistent with this Court's evolving policy concerning the application of the federal antitrust laws to the performance of essential governmental functions and duties by local governmental units.

Since 1978 this Court has considered two cases concerning the extent to which

local government units will be immune from suits under the federal antitrust laws. Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). In those cases the Court held that municipal governments did not have any blanket immunity from the antitrust laws, but could be exempt where the allegedly anticompetitive conduct is "in furtherance or implementation of a clearly articulated and affirmatively expressed state policy." Community Communications Co., Inc. v. City of Boulder, 455 U.S. at 52. However, the Court was careful to point out that immunity for municipal governments is different than immunity for private parties acting pursuant to state commands, because a municipality need not "point to a specific, detailed legislative authorization before it may properly assert

a Parker defense"; rather, immunity is proper where the state authorized the city to operate in a particular area and the legislature "contemplated the kind of action complained of." City of Lafayette, 435 U.S. at 415. In this case the lower courts correctly applied these standards to find that the Iowa legislature, in promulgating the extensive and detailed legislation concerning joint and collaborative municipal action to solve significant sanitation and environmental problems, must have contemplated that facilities like Metro would be operated exclusively.

The lower courts in this case made specific and justifiable conclusions from the record presented to them. Specifically, those courts found that the municipalities were performing essential and important governmental functions in providing for the disposal of solid waste

in their communities and that the state had imposed on them the duty to safely and efficiently dispose of solid waste. Second, the state legislated comprehensively with the purpose of ensuring that municipal governments had sufficient power and direction in performing these essential functions. Third, the courts concluded that the realities of the municipal bond market in the early 1970's required that bond-issuing municipalities guarantee a source and stream of revenues sufficient to retire the bonds, or the bonds would simply be unmarketable. Fourth, the federal courts believed that an Iowa judicial interpretations that the statutory scheme and the exclusivity provisions in the Agreement and Contract were related to state objectives and commands and that those interpretations should be given some weight. These considerations justified the

federal courts conclusion in this case that the Iowa legislature had contemplated the issue of exclusive municipal control of solid waste disposal for the related reasons of safety and environmental concerns and the financial requirement that a source of revenues be guaranteed for repayment of the bonds.

The courts' decisions in this case are consistent with the decisions of other circuits which have considered the difficult issue of when a state "contemplates" or "comprehends" that a municipal government will engage in anticompetitive conduct in accomplishing an essential governmental duty. The courts have held that a legislative contemplation that a municipality will engage in anticompetitive conduct may be found from a comprehensive and detailed statutory arrangement,[1] or where the

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[1] Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).

allegedly anticompetitive conduct bears a causal and reasonably connected relationship with legitimate municipal conduct,[2] or where such an inference is permissible for a statute which is inherently anticompetitive.[3]

The Ninth Circuit Court of Appeals decision in Parks v. Watson, 716 F.2d 646 (1983) is not to the contrary. The Parks case involved the use of geothermal wells for residential heating and the Oregon statutory arrangement permitted public ownership of the geothermal resources, but did not impose any affirmative duties on the municipal governments to develop or regulate the area. Unlike the disposal of

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[2]Pueblo Aircraft Service v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982).

[3]Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).

solid waste materials in Iowa, the Oregon communities were permitted to develop geothermal heating facilities and could issue either general obligation or revenue bonds to accomplish the task if they chose to enter the market. Such discretionary governmental involvement is simply not evident in the area of sewerage and solid waste disposal. The safely-engineered and environmentally-controlled disposal of solid waste materials is an essential governmental function in Iowa and is not merely an area of possible and discretionary activity by local governmental units.

In this case the lower courts found that the Iowa legislature must have contemplated that the Metro would be operated as an exclusive landfill in the community served because of the closely-connected and obvious requirement that the revenue bonds have an exclusive

source of repayment and because the comprehensive and detailed statutory arrangement evidenced a legislative understanding that open and robust competition would not exist in this area. The courts' decisions are fully consistent with the decisions of this Court in City of Lafayette and City of Boulder and with the decisions of other circuit courts which have considered the issue of legislative contemplation of essential governmental services.

In its Petition for Writ of Certiorari the Petitioner makes the disingenuous argument that the decisions of the federal district court and court of appeals in this case have rendered meaningless this Court's rulings and have given municipalities an open license to engage in anticompetitive conduct. (Petition, p. 21). These contentions, coming as they do from a party with a chronic and unbroken history of

violations of sanitation and environmental requirements for the operation of landfills, fail to recognize the compromise crafted by the lower courts between local government's interest in effective, safe and fiscally responsible solid waste disposal and the encouragement of private enterprises and competition as national economic objectives. The lower courts approached the difficult issue of discerning state legislative contemplation and state policy with integrity and sensitivity for local perogative, and their conclusion that this issue must be resolved on a case-by-case basis by consideration of a number of factors is consistent with this Court's approach to other complex areas of federal-state relations under the Tenth Amendment. See, e.g., Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., 452 U.S. 264 (1981); National League of Cities v. Usery, 426 U.S. 833 (1976).

## II. ACTIVE STATE SUPERVISION OF MUNICIPAL CONDUCT IS NOT REQUIRED WHERE MUNICIPALITY PERFORMING NECESSARY AND ESSENTIAL GOVERNMENTAL FUNCTIONS.

The Petitioner also contends that review by this Court is appropriate because the courts below erred in concluding that immunity under the state action doctrine does not require that a municipality demonstrate active state supervision over the allegedly anticompetitive conduct. However, the circuit courts which have carefully examined this issue have concluded that active state supervision is not required where a municipal government[4] is engaging in governmental

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[4]The dual requirements of an affirmatively expressed state policy and active state supervision are appropriate standards for adjudging the behavior of private parties allegedly acting pursuant to state requirements. California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). The second requirement of active state supervision is not particularly helpful in examining the activities of municipal governments performing essential, governmental activities.

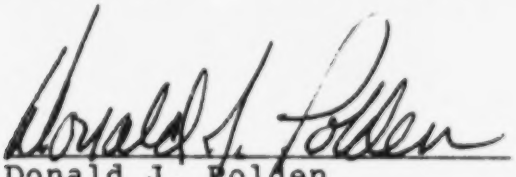
activities traditionally performed by local and municipal government units. Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (18th Cir. 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983); Cf. Corey v. Look, 641 F.2d 32 (1st Cir. 1981) (court applied both standards under Midcal case to nonessential activity of operating parking lots without any analysis of the active supervision requirement). Therefore, the Eighth Circuit Court of Appeals was correct in concluding that active state supervision is not required in a case such as this, and there are no compelling reasons for this Court's review of that conclusion.

## CONCLUSION

For the reasons discussed above, particularly the clear conformity of the appellate court's decision and reasoning to prior decisions of this Court and the decisions of other appellate courts in

factually similar cases, the Petition for Writ of Certiorari should be overruled and a writ not issued.

Respectfully submitted,



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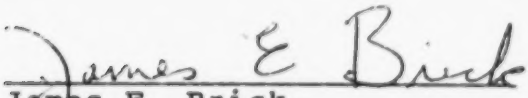

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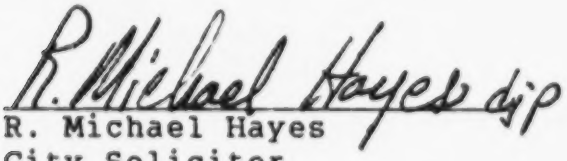

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